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United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	) Criminal Case No. 08CR2197-L
Plaintiff,	)
v.	) **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:**
	) **(1) COMPEL DISCOVERY;**
JOSE ALFONSO-CORTEZ-HERRERA,	) **(2) PRESERVE EVIDENCE; AND**
	) **(3) FOR LEAVE TO FILE FURTHER MOTIONS**
Defendant.	) **AND GOVERNMENT'S MOTIONS FOR FINGERPRINT EXEMPLARS AND RECIPROCAL DISCOVERY**
	) **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES**
	) Date: August 5, 2008
	) Time: 2:00 p.m.
	) Court: The Hon. M. James Lorenz

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Nicole Acton Jones, Assistant United States Attorney, and hereby files its Response and Opposition to Defendant's discovery motion in the above-referenced case. Said response is based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

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I

STATEMENT OF THE CASE

On July 2, 2008, a federal grand jury in the Southern District of California returned a two-count Indictment charging defendant Jose Alfonso Cortez-Herrera ("Defendant") with Attempted Entry After Deportation, in violation of Title 8, United States Code, Section 1326 and Fraud and Misuse of an Entry Document, in violation of Title 18, United States Code, Section 1546. Defendant will be arraigned on the indictment at the motion hearing on August 5, 2008.

II

STATEMENT OF FACTS

A. Defendant's Apprehension

On April 1, 2008, at approximately 12:24 p.m., Defendant applied for admission to the United States through a San Ysidro Port of Entry primary pedestrian lane. Defendant presented an I-551 card and a California Identification Card in the name of Juan Diaz and stated he was a legal permanent resident through his wife. Defendant also stated he was going to Riverside, California. The primary officer suspected that Defendant was an imposter to the documents and referred him to secondary inspection. In secondary, officers identified Defendant and determined that he was a previously deported criminal alien.

Defendant was placed under arrest and advised of his Miranda rights. Defendant elected to exercise his right to remain silent.

B. Defendant's Criminal and Immigration History

On or about July 8, 2004, Defendant was convicted in Riverside County Superior Court of Carjacking with a weapon in violation of PC §§ 215 and 12022(a). Defendant was sentenced to 5 years in prison.

On or about June 13, 2003, Defendant was convicted in Los Angeles County Superior Court of Possession of a Controlled Substance for Sale (methamphetamine) in violation of HS § 11378. Defendant was sentenced to 16 months in prison.

On October 23, 2007, Defendant was ordered deported from the United States to El Salvador by an Immigration Judge. On November 14, 2007, Defendant was physically removed from the United States to El Salvador via a Justice Prisoner and Alien Transportation System (JPATS) flight.

III

DEFENDANT'S MOTIONS

A. MOTION TO COMPEL DISCOVERY

1. Discovery in this Matter is Current

The Government has and will continue to fully comply with its discovery obligations. To date, the Government has provided Defendant with 45 pages of discovery and one DVD. The Government has ordered Defendant's A-file and will produce all non-privileged documents. The Government has also ordered Defendant's deportation tape and will provide Defendant with a copy. Furthermore, the Government will request that the arresting agency preserve any evidence the Government intends to introduce in its case-in-chief or that may be material to the defense.

2. The Government Has and Will Continue to Comply With Its Discovery Obligations

The Government recognizes and acknowledges its obligation pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act, and Rules 12 and 16 of the Federal Rules of Criminal Procedure. As set forth above, the Government has complied and will continue to comply with its discovery obligations going forward.

As to exculpatory information, the United States is aware of its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) and will comply. The United States will also produce any evidence of bias/motive or impeachment of any of its witnesses of which it becomes aware. An inquiry pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) will also be conducted.

The United States will provide a list of witnesses at the time the Government's Trial Memorandum is filed. The grand jury transcript of any person who will testify at trial will also be produced. The United States will produce any reports of experts that it intends to use in its case-in-chief at trial or such reports as may be material to the preparation of the defense.

The United States has provided information within its possession or control pertaining to the prior criminal history of Defendant. If the Government intends to offer any evidence under Rules 404(b) or 609 of the Federal Rules of Evidence, it will provide timely notice to Defendant.

To the extent Defendant requests other specific documents or types of documents, the Government will continue to disclose any and all discovery required by the relevant discovery rules. Accordingly, the Government respectfully requests that no orders compelling specific discovery by the United States be made at this time.

3. The Government Objects to Requests for Discovery That Go Beyond Any Statutory or Constitutional Disclosure Provision.

a. Defendant's Statements

The United States recognizes its obligations under Fed. R. Crim. P. 16(a)(1)(A) to disclose "the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement in trial." The United States has turned over the report of investigation and the primary and secondary reports, which disclose the substance of Defendant's oral statements. If additional reports by United States' agents come to light, the United States will supplement its discovery.

The United States is not required under Fed. R. Crim. P. 16 to deliver oral statements, if any, made by a defendant to persons who are not United States' agents. Nor is the United States required to produce oral statements, if any, voluntarily made (i.e. statements that were not made in response to interrogation) by a defendant to United States' agents. See United States v. Hoffman, 794 F.2d 1429, 1432 (9th Cir. 1986); United States v. Stoll, 726 F.2d 584, 687-88 (9th Cir. 1984). Moreover, the United States will not produce rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

The United States also recognizes its obligations under Fed. R. Crim. P. 16(a)(1)(B) to disclose relevant written or recorded statements by Defendant. The Government has disclosed the videotape of Defendant's post-arrest statement. The Government will also disclosed the audiotape of Defendant's deportation hearing.

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b. Rough Notes

The United States will fully comply with its discovery obligations under the Jencks Act. The United States objects, however, to Defendant's premature request for the production of any rough notes of United States' agents. For purposes of the Jencks Act, a "statement" is (1) a written statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness' oral statement, or (3) a statement by the witness before a grand jury. See 18 U.S.C. § 3500(e). Notes of an interview only constitute statements discoverable under the Jencks Act if the statements are adopted by the witness, as when the notes are read back to a witness to see whether or not the government agent correctly understood what the witness said. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)). In addition, rough notes by a government agent "are not producible under the Jencks Act due to the incomplete nature of the notes." United States v. Cedano-Arellano, 332 F.3d 568, 571 (9th Cir. 2004). Moreover, the production of agents' notes related to Defendant's statements is not required under Fed. R. Crim. P. 16 because the United States has "already provided defendant with copies of the formal interview reports prepared therefrom." United States .v Griffin, 659 F.2d 932, 941 (9th Cir. 1981). Indeed, the Government has produced a videotape of the entire statement.

In any case, production of this material need only occur after the witness making the Jencks Act statements testifies on direct examination. See United States v. Robertson, 15 F.3d 862, 873 (9th Cir. 1994). Accordingly, the United States reserves the right to withhold Jencks Act statements of any particular witness it deems necessary until after they testify. The United States will, however, take steps to preserve any rough notes that exist in this case.

c. Impeachment Evidence

Regarding prospective government witnesses, the Government will provide the defendant with the following items prior to any such witness's trial testimony:

(1) The terms of all agreements (or any other inducements) it has made with government witnesses, if they are entered into;

(2) All relevant exculpatory evidence concerning the credibility or bias of government witnesses as mandated by law; and,

(3) Any record of prior criminal convictions (of which the Government is aware) that could be used to impeach a government witness.

Furthermore, any uncharged prior misconduct attributable to government witnesses, all promises made to and consideration given to such witnesses by the Government, and all threats of prosecution made to government witnesses by the Government will be disclosed if required by the doctrine of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 450 U.S. 150 (1972). The Government will not provide information which "arguably could be helpful or useful to the defense" because it does not meet the Brady standard.

As stated above, the Government recognizes its obligation under Brady and Giglio to provide material evidence that could be used to impeach Government witnesses including material information related to perception, recollection, ability to communicate, or truth telling. The Government, however, objects to providing any evidence that a witness has *ever* used narcotics or other controlled substance, or has *ever* been an alcoholic because such information is not discoverable under Rule 16, Brady, Giglio, Henthorn, or any other Constitutional or statutory disclosure provision.

d. Witness Lists

While the Government will supply a tentative witness list with its trial memorandum, the Government objects to providing addresses. See United States v. Steele, 785 F.2d 743, 750 (9th Cir. 1986); United States v. Sukumolachan, 610 F.2d 685, 688 (9th Cir. 1980); United States v. Conder, 423 F.2d 904, 910 (9th Cir. 1970) (addressing defendant's request for the addresses of actual Government witnesses). The Government also objects to any request that the United States provide a list of every witness to the crimes charged who will not be called as a United States witness. "There is no statutory basis for granting such broad requests," and a request for the names and addresses of witnesses who will not be called at trial "far exceed[s] the parameters of Rule 16(a)(1)(c)." United States v. Hsin-Yung, 97 F. Supp.2d 24, 36 (D. D.C. 2000) (quoting United

States v. Boffa, 513 F. Supp. 444, 502 (D. Del. 1980)). In any case, Defendant has already received access to the names of potential witnesses through the discovery sent to his counsel.

e. Statements Relevant to the Defense

The United States objects to the request for "any statement relevant to any possible defense or contention" as overbroad and not required by any discovery rule or Ninth Circuit precedent. In making this request, Defendant relies on United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982), overruled on other grounds by Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 1499 (1988). Defendant asserts that Bailleaux interprets Fed. R. Crim. P. 16 as requiring the United States to disclose "any statement relevant to any possible defense or contention" that Defendant might assert. However, the Ninth Circuit holding was not so broad. In fact, the Ninth Circuit, interpreting Fed. R. Crim. P. 16, held: "We believe the Government should disclose any statement made by the defendant that may be relevant to any possible defense or contention that the defendant might assert." See Bailleaux, 685 F.2d at 1114 (emphasis added). Therefore, the United States will only disclose relevant statements made by Defendant pursuant to this request.

f. Personnel Records of Government Officers Involved in the Arrest

The United States has complied and will continue to comply with United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) by requesting that all federal agencies involved in the criminal investigation and prosecution review the personnel files of the federal law enforcement inspectors, officers, and special agents whom the United States intends to call at trial and disclose information favorable to the defense that meets the appropriate standard of materiality. See United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the materiality of incriminating information in the personnel files is in doubt, the information will be submitted to the Court for an in camera inspection and review.

Defendant's request that the specific prosecutor in this case review the personnel files is unwarranted and unnecessary. Henthorn expressly provides that it is the "government," not the prosecutor, which must review the personnel files. Henthorn, 931 F.2d at 30- 31. Accordingly, the United States will utilize its typical practice for review of these files, which involves requesting designated representatives of the relevant agencies to conduct the reviews. The United States opposes the request for an order that the prosecutor personally review the personnel files.

Defendant has not cited any competent authority that requires the United States to produce "all citizen complaints and other related internal affairs documents." The case cited by Defendant, Pitchess v. Superior Court, 11 Cal.3d 531, 539 (1974) has been superceded by statute. See Fagan v. Superior Court, 111 Cal. App.4th 607 (2003). Moreover, Pitchess involved a criminal case in which a defendant who claimed to have acted in self-defense sought evidence as to the police officers' use of force on previous occasions. Pitchess, 11 Cal. 3d at 534, 535. Pitchess is simply inapplicable to Defendant's case.

B. MOTION FOR LEAVE TO FILE FURTHER MOTIONS

The United States does not object to the granting of leave to allow Defendant to file further motions, as long as the order applies equally to both parties and additional motions are based on newly discovered evidence or discovery provided by the United States subsequent to the instant motion at issue.

IV

UNITED STATES' MOTIONS

A. FINGERPRINT EXEMPLARS

The United States requests that the Court order that Defendant make himself available for fingerprinting by the United States' fingerprint expert. See United States v. Ortiz-Hernandez, 427 F.3d 567, 576-77 (9th Cir. 2005) (Government may have defendant fingerprinted and use criminal and immigration records in Section 1326 prosecution). The privilege against self-incrimination only applies to testimonial evidence. See Schmerber v. California, 384 U.S. 757, 761 (1966) (withdrawal of blood is not testimonial). Identifying physical characteristics, including fingerprints, are not testimonial in nature and the collection and use of such evidence does not violate Defendant's Fifth Amendment right against self-incrimination. United States v. DePalma, 414 F.2d 394, 397 (9th Cir. 1969).

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B. RECIPROCAL DISCOVERY

The United States moves the Court to order Defendant provide all reciprocal discovery to which the United States is entitled under Rules 16(b) and 26.2. Rule 16(b)(2) requires Defendant to disclose to the United States all exhibits and documents which Defendant "intends to introduce as evidence in chief at the trial" and a written summary of the names, anticipated testimony, and bases for opinions of experts the defendant intends to call at trial under Rules 702, 703, and 705 of the Federal Rules of Evidence.

IV

CONCLUSION

For the foregoing reasons, the Government respectfully requests that Defendant's motions be denied. The Government further requests that its motions be granted.

DATED: July 29, 2008.

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ ***Nicole Acton Jones***
NICOLE ACTON JONES
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	)	Criminal Case No. 08CR2197-L
v.	)	
JOSE ALFONSO CORTEZ-HERRERA, Defendant.	)	CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, NICOLE ACTON JONES, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **RESPONSE AND OPPOSTION** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Kurt Hermansen

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 2008.

/s/ ***Nicole Acton Jones***
NICOLE ACTON JONES
Assistant U.S. Attorney